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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1331

REVELLE W. BROWN, JOHN A. DIEMAND, DR. GILSON COLBY ENGEL, FRED FOX, WALTER S. FRANKLIN, WALTER B. GIBBONS, ESQUIRE, HUBERT J. HORAN, JR., ESQUIRE, DR. LOUIS P. HOYER, FREDERICK H. LEVIS, DAVID F. MAXWELL, ESQUIRE, MRS. MINA F. OLIVER, ROLAND RODROCK RANDALL and HARRY G. SCHAD, Trustees of the Estate of Stephen Girard,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA and ALAN LEVI BOND, by his mother, MRS. RUBY BOND, CHARLES WILLIAM HICKS and THEODORE LEWIS HICKS, by their mother, MRS. MARIE HICKS, JAMES SCRUGGS, and HENRY SCRUGGS, by their mother, MRS. ARDELLA SCRUGGS, TYRONE KARL WHITE and TERRY SHERWOOD WHITE, by their mother, MRS. CHARLOTTE L. WHITE, on behalf of themselves and all others similarly situated,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. The City's Historical Relationship of Trustee, Which Was Terminated in 1959, Does Not Now Import State Responsibility For the Acts of the Present Private Trustees.

Respondents' principal reliance is placed, not upon the *present* relationship between the City and the trust, but upon the past relationship, which terminated upon the removal of the City as trustee in 1959 (pages 3-12 of Respondents' Brief in Opposition).[1] This argument is prefaced with the sweeping assertion that Petitioners do not disagree with the finding of the District Court that the Commonwealth and the City have given " . . . aid, assistance, direction, and involvement to the construction, maintenance, operation and policies of Girard College." (page 3 of Respondents' Brief in Opposition). To the extent that this statement refers to such matters as exemption from taxes and tort liability which were or are common to *all* charities, Petitioners agree, but, to the extent the statement implies a special significant State involvement with Girard College prior to 1959, the undisputed facts are to the contrary.

Stephen Girard established the City of Philadelphia as the trustee of his residuary trust by naming to that position "the Mayor, Alderman and Citizens of Philadelphia, their

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[1]Respondents' only reference to an alleged contact between city and trust which has occurred subsequent to 1959 is directed to the lease by petitioners, in 1963, of certain real estate to the Community College of Philadelphia. (Footnote 8, p. 9 of Respondents' Brief in Opposition). The District Court found, as a fact, that this lease was executed after arms-length bargaining, including the taking of competitive bids, and did not constitute State assistance within the meaning of the Fourteenth Amendment. (A52). Respondents do not challenge this finding.

successors and assigns,"[2] (R. 44a). The Pennsylvania Supreme Court has said that he did so merely in order to obtain a perpetual trustee—there being no trust companies yet in existence—and has held that the identity of the trustee was otherwise not important to Girard. *Girard Will Case,* 386 Pa. 548, 568-569, 127 A. 2d 287, 296 (1956); *Girard College Trusteeship,* 391 Pa. 434, 444, 138 A. 2d 844, 848 (1958).[3]

In acting as trustee the City did so merely as a fiduciary. The Pennsylvania Supreme Court held in the *Girard Will Case, supra,* (386 Pa. at 561, 127 A. 2d at 293):

> "It is true that Girard appointed the City of Philadelphia as the trustee to administer the trust according to the terms of his will, but he certainly did not

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[2]Respondents argue that the Commonwealth played an essential role in the establishment and administration of the trust because of certain legislation which they cite. (Respondents' Brief in Opposition, pp. 9-10). This same legislation had been cited to the Pennsylvania Supreme Court in *Girard College Trusteeship, supra,* and was there disposed of as follows (391 Pa. at 445-446, 138 A. 2d 844, 849 (1958)) in an opinion by Chief Justice Charles Alvin Jones: "The statutes and ordinances which the appellants urge as having made a public trust of Girard College did not so operate. Certain it is that no additional legislation was required to clothe the City with the fiduciary powers necessary for the administration of Girard College . . . The legislative enactments which the appellants stress were designed in large part to enable the Commonwealth and the City to receive and use for their governmental purposes pecuniary legacies bequeathed directly to them by Girard's will. The rest of the legislative enactments were purely administrative measures neither envisioned nor required by Girard's will. And, the same can be said for the ordinances which the appellants cite."

[3]Respondents' counsel would have this Court believe that Girard was primarily interested in benefiting the City (Respondents' Brief in Opposition, p. 4). To the contrary, the Will shows that his primary interest was the College and that he was interested in the general welfare of the City only secondarily (R. 44a). The Pennsylvania Supreme Court has held that Girard's dominant purpose was the establishment of the College. *Girard Will Case,* 386 Pa. at 568, 127 A. 2d at 296.

> intend thereby to empower it to conduct such administration in its *public or governmental capacity*, or to bring into play any of its *proprietary* rights, since it is merely the title holder of Girard's property and not its beneficial owner. As a *trustee* it was to act and could act only in a *fiduciary* capacity, exercising no State or governmental function or power in the slightest degree, but being limited to the same rights, powers and duties, no more and no less, as those of any private individual or trust company acting as trustee."

This then is the law of Pennsylvania. The City exercised no governmental power or authority over the school or the trust assets, nor did it have any proprietary interest, during the period of its trusteeship. Its role was no greater and no different than that of an individual trustee. The beneficial ownership of the trust assets was never in the City. Accordingly, those assets have never been impressed with state or governmental characteristics, and the removal of the City from its position as trustee terminated state involvement.

The limited constitutional implication of the involvement of a municipality merely as a trustee is best evident from the prior two appeals to the Supreme Court. As the Supreme Court said in *Evans*, the first Girard case decided that the Equal Protection Clause "bars a city from acting as a trustee under a private will which serves the racial segregation cause." (382 U. S. at 298).[4] After the state agency

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[4]To the same effect is Chief Justice Warren's statement for the majority in *Griffin* v. *State of Maryland*, 378 U. S. 130, 136 (1964): "The Board of Trusts Case [The Girard Case] must be taken to establish that to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment."

had been removed as trustee, and the refusal to admit could no longer be the state's refusal, the next appeal was dismissed and the petition for certiorari denied.[5]

Despite the fact that the City was acting only as a trustee, Respondents' counsel have endeavored to create the impression that the City and the State are solely responsible for the present College and the present trust assets. It has been argued that "but for" the actions of the City and the Commonwealth there would be no Girard College and there would be no multi-million dollar estate. (Respondents' Brief in Opposition, p. 11). Nothing could be further from the truth. The College and the trust assets are probably no different, and certainly no better or greater, than they would have been if private persons had been the trustees throughout.

Although the City as trustee gave the necessary orders to cause the construction of Girard College, it did so only in response to Girard's directions, with Girard's money, and as Girard's testamentary agent. This is totally unlike the conceiving, planning, constructing and financing of the public parking complex by the governmental authority in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961).

Contrary to Respondents' contention, the past relationship between the City and the Trust is not *"Burton* Revisted." (Respondents' Brief in Opposition, p. 18). This Court clearly held, in *Burton,* that the quality of State in-

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[5]Respondents' argument (Respondents' Brief in Opposition, p. 20) that the Supreme Court of Georgia, in *Evans* v. *Newton,* 220 Ga. 280, 138 S. E. 2d 573 (1965) ". . . expressly held . . . that the denial of certiorari in the second *Board of Directors* case was a holding that this Court had approved substitution of Trustees as a device for maintaining segregation," and that this Court reversed such a holding, is directly contrary to fact. The Supreme Court of Georgia made no such finding, and this Court did not discuss the second *Board of Directors* case in *Evans.*

volvement, not the mere volume, determines State action. In *Burton,* since it could be said without dispute that *but for* the government there would have been no restaurant, the State was significantly involved, and, accordingly, State action was present. In this case it is equally clear that *but for* Stephen Girard, rather than the City, there would be no Girard College.[6]

The fact of the matter is that the City's only interest in Girard College was that of a testamentary agent of Stephen Girard. Not a penny of public money nor an ounce of public power went into the building of the College or the administration of the trust. The suggestion of the Respondents that the buildings be torn down and the assets given away if the trust is to be purged of its "public character" is sheer nonsense. The trust never had governmental characteristics—only the trustee, and it was removed long ago.

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[6]None of the restaurant sit-in cases cited by Respondents is conceivably in point. In those cases the city or state had either legislated against mixed eating or had by statement of policy or regulation made it impossible or difficult to obtain desegregated service. *Peterson* v. *City of Greenville,* 373 U. S. 244 (1962); *Lombard* v. *Louisiana,* 373 U. S. 267 (1962); *Robinson* v. *Florida,* 378 U. S. 153 (1964); *Mason* v. *Biloxi,* 385 U. S. 370 (1966). Here, there never has been any legislation encouraging discrimination, and both the City and State have been actively engaged since 1956 in attempting to expand Girard's gift to include Negroes. In *Eaton* v. *Grubbs,* 329 F. 2d 710 (4th Cir. 1964), the hospital there involved had been given by the city to the hospital corporation; the city had the right of reverter if it was not continued as a hospital; the corporation had the power of eminent domain; the city and county regularly appropriated money for the operation of the hospital, and two new wings had been built with government funds. In *Hampton* v. *Jacksonville,* 304 F. 2d 320 (5th Cir. 1962), the city, having been directed to desegregate its public golf course, conveyed the course to private operators with a reverter in the event that it was not forever maintained as a course. Here the original property was Girard's, and all moneys expended in construction and operation have been derived from the principal or income of his gift.

CONCLUSION

Respondents are clearly in error when they contend that no important Federal question is presented by this Petition. (Respondents' Brief In Opposition, p. 15). To the contrary, as is demonstrated in the Petition, this proceeding raises substantial questions which will affect, and possibly change, the formerly well-settled law governing testamentary charitable dispositions and private education.

For the foregoing reasons, in addition to those contained in the Petition, the Petition should be granted.

Respectfully submitted,

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